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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-117

NATIONAL BROILER MARKETING ASSOCIATION,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

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MOTION BY AMERICAN FARM BUREAU FEDERATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The American Farm Bureau Federation, pursuant to Supreme Court Rule 42, hereby respectfully moves for leave to file a brief *amicus curiae* in this case. Written consent of the respondent has been obtained and is filed herewith. Consent of the petitioner was requested but refused.

The American Farm Bureau Federation of 225 Touhy Avenue, Park Ridge, Illinois 60068, is a general farm or-

ganization organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois. The American Farm Bureau has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member state Farm Bureau organizations in all of the states (except Alaska) and in Puerto Rico, representing more than 2.5 million member families.

The interest of the American Farm Bureau Federation in this case is to represent and protect the economic well-being of all Farm Bureau members engaged in broiler growing and in other forms of farming. Any interpretation of the Capper-Volstead Act by the Supreme Court will have a direct bearing on all farmers and ranchers of the nation.

If the petitioner's position is adopted, farmers and ranchers will lose the rights intended for them under the Capper-Volstead Act. In effect, the petitioner is asking that these grower rights be transferred from the grower to integrated broiler processing companies which neither own nor operate broiler farms. This is contrary to the intent of Congress and is against public policy. Monopoly power—whether it arises in industry, labor, agriculture or government—is a threat to our American way of life and to the individual freedom of every American.

The ability of the broiler growers, as farmers, to collectively bargain with integrated companies would be eliminated if the petitioner's position prevails. The integrated broiler companies, acting in concert as "farmers," could collectively maintain the price or price range to be paid to the broiler grower for the production of broilers without

thereby violating the Sherman Anti-Trust Act. In addition, the integrated companies would have the ability to agree on other production requirements to be uniformly imposed on growers, not mentioning the ability to agree on marketing terms for the sale of processed broilers.

In deliberating the issue of whether an integrated company is a person engaged in the production of agricultural products as a farmer within the meaning of the Capper-Volstead Act, it is doubtful that the parties will fully consider the economic bargaining relationship between the independent contract broiler grower as a farmer entitled to the Act's protection and the integrated company.

The petitioner, in claiming that the integrator is the real farmer of broilers, will scarcely admit to the fact that broilers are actually produced by broiler growers.

Not only does this case involve the rights of broiler growers as farmers, but also a much broader question of the extension of Capper-Volstead benefits to large non-farming businesses which perform production-related activities but neither own nor operate the farms on which the relevant agricultural commodity is produced.

Farmers and ranchers are facing difficult economic conditions today, similar to those confronting farmers in 1922 when the Capper-Volstead Act was enacted. In the wisdom of Congress, the family farmer has needed a legal framework through which he can work together with other farmers in cooperative associations without being held as illegal combinations or conspiracies in restraint of trade.

The Capper-Volstead Act has been a viable law intended to help bona fide farmers achieve a justifiable return for

their investment and labor in producing commodities. The Act was clearly not intended to help those entities which are not farmer owned or controlled and with which farmers must deal to bring the fruits of their labor to market. The contention of petitioner in this case is inimical to the best interests of all American farmers and ranchers.

In view of the issues and ramifications in this case, which are broader in scope than the briefs of the parties hereto would indicate, the American Farm Bureau Federation respectfully requests that it be permitted to file an *amicus curiae* brief in this case so that the views of the farmers and ranchers of the United States in this controversy may be more adequately presented.

Respectfully submitted,

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INDEX TO BRIEF

PAGE

Opinions Below 1

Interest of Amicus Curiae..... 2

Argument 3

Integrated Companies Which Do Not Actually Produce Broiler Chickens on Farms But Which Are Otherwise Involved in Production-related Activities and the Sale of Processed Broilers Are Not Persons Engaged as Farmers Under the Limited Antitrust Exemption of the Capper-Volstead Act 3

A. The Function and Input of the Contract Broiler Grower in Actually Producing Broiler Chickens Excludes the Integrated Company as Being a Farmer Which Produces Fowl Within the Meaning of the Capper-Volstead Act 3

B. The Bargaining Position of the Broiler Grower as the Only Farmer of Broilers Is Effectively Eliminated by Conferring Benefits of the Capper-Volstead Act on Integrated Companies 7

C. Subsequent Legislation Prohibits Extension of the Capper-Volstead Act to Integrated Companies 10

Conclusion 14

CITATIONS

Cases

Bayside Enterprises, Inc. v. National Labor Relations Board, 429 U. S. 298 6

Butz v. Lawson Milk Co., Division Consol. Foods Corp., 386 F. Supp. 227 13

Case-Swayne Company v. Sunkist Growers, Inc., 389 U. S. 384 ..... 7, 9

Marketing Assist. Plan, Inc. v. Associated Milk Pro Inc., 338 F. Supp. 1019 13

Maryland and Virginia Milk Producers Association v. United States, 362 U. S. 458 4

Statutes

Agricultural Fair Practices Act, 7 U. S. C. 2301 et seq. 10, 11, 12, 13, 14

7 U. S. C. 2301 10

7 U. S. C. 2302(a) 12

7 U. S. C. 2302(b) 13

7 U. S. C. 2302(c) 13

7 U. S. C. 2303(b) 10

Agricultural Marketing Act of 1929, Section 15(a), 12 U. S. C. 1141j(a) 13, 14

Capper-Volstead Act, 7 U. S. C. 291 et seq. .....*passim*

7 U. S. C. 291 .....2, 4, 13, 14

7 U. S. C. 292 2

Clayton Act, Section 6, 15 U. S. C. 17 ..... 3, 4

National Labor Relations Act, Section 2(3), 29 U. S. C. 152(3) 6

Sherman Act, Section 1, 15 U. S. C. 1 9

Miscellaneous

National Commission on Food Marketing, "Organization and Competition in the Poultry and Egg Industries," Technical Study No. 2, page 10, (1966)..... 8

Senate Report No. 474, 90th Cong., 1st Sess. (1967)..11, 13

U. S. Code, Cong. & Admin. News (1968), page 1875..11, 12

USDA, Farmer Cooperative Service, Service Report 151, pages iv (preface), 4 and 6, (1977)..... 8

62 Cong. Rec. (1922):

page 2057 9

page 2274 9

page 2275 9

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BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

OPINIONS BELOW.

The opinion of the court of appeals is reported at 550 F. 2d 1380. The opinion of the district court from which the appeal was made is not officially reported, but appears at 1975-2 Trade Cases, ¶ 60,509, CCH.

INTEREST OF AMICUS CURIAE.

The American Farm Bureau Federation (hereinafter referred to as "Farm Bureau") of 225 Touhy Avenue, Park Ridge, Illinois 60068, is a voluntary general farm organization, representing more than 2.5 million member families in every state (except Alaska) and Puerto Rico. Organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois, the Farm Bureau has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of farmers and ranchers of the United States.

At issue in this case is the right of broiler growers as bona fide farmers to collectively avail themselves of the limited antitrust exemption benefits under the Capper-Volstead Act, 7 U. S. C. 291 and 292, for the purpose of improving their bargaining power. Farm Bureau members and others who produce broiler chickens under contract with large integrated companies primarily in the southern and northeastern states constitute "farmers" within the meaning of the Capper-Volstead Act and are fully entitled to the protection of the Act. However, the integrated companies, which belong to petitioner, and with which such broiler producers deal, claim to be the "real" farmers of broilers by virtue of the fact that they contract with the broiler growers for broiler production and maintain an investment in broiler processing and distribution facilities.

If integrated broiler companies are allowed the benefits of the Capper-Volstead Act, the rights of the broiler producer under the Act will be rendered meaningless in view

of the ability of the integrators to collectively impose production terms on the producer.

Farm Bureau, as an organization dedicated to preserving and promoting the rights of bona fide farmers, supports an interpretation of the Capper-Volstead Act which will recognize that the contract broiler producer, and not the integrated company, is the real farmer entitled to the Act's limited antitrust exemption.

ARGUMENT.

Integrated Companies Which Do Not Actually Produce Broiler Chickens on Farms but Which Are Otherwise Involved in Production-Related Activities and the Sale of Processed Broilers Are Not Persons Engaged as Farmers Under the Limited Antitrust Exemption of the Capper-Volstead Act.

A. The Function and Input of the Contract Broiler Grower in Actually Producing Broiler Chickens Excludes the Integrated Company as Being a Farmer Which Produces Fowl Within the Meaning of the Capper-Volstead Act.

The issue before this court requires an explanation of what constitutes a "farmer" under the limited antitrust privileges of Section 6 of the Clayton Act, 15 U. S. C. 17[1]

1. Section 6 of the Clayton Act provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organiza' ons from lawfully carrying out the legitimate

(Footnote continued on next page.)

and Section 1 of the Capper-Volstead Act, 7 U. S. C. 291.[2] Neither statute contains language defining the various attributes of a "farmer." Congress recited merely that farmers are "persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers." 7 U. S. C. 291.

(Footnote continued from preceding page.)

objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U. S. C. 17.

2. Section 1 of the Capper-Volstead Act provides:

"Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such association may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however*, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members." 7 U. S. C. 291.

In 1922, Section 6 of the Clayton Act was broadened by enactment of the Capper-Volstead Act. The Capper-Volstead Act extended Section 6 to capital stock agricultural cooperatives. *See Maryland and Virginia Milk Producers Association* v. *United States*, 362 U. S. 458, at 466 (1960).

In spite of the degree of sophistication of modern agriculture or "agri-business," a person or other entity cannot generically be a farmer without owning or operating a farm on which an agricultural commodity is produced. If a farmer engages in other non-farming business or in farm-related business, he still remains a "farmer" for purposes of the agricultural commodity produced on his farm.

The contention of petitioner in the instant case is that persons or entities which neither own nor operate farms on which broiler chickens are produced are nevertheless "farmers" of the broilers under the above Acts. Petitioner claims that its integrated company members are farmers of the 8 to 10 week-old broiler chickens because they engage in one or more farm-related businesses such as broiler processing, feed production, chick production, and hauling. Stated differently, the member companies of petitioner would find it beneficial to call themselves Capper-Volstead type farmers to advance their non-farming investments under the antitrust benefits of the law.

Farmers known as "contract broiler growers" own and operate the farms on which the broilers in question are produced. The broiler grower invests in land, buildings, equipment and labor, and provides the day-to-day skill required to raise a broiler to maturity. The grower contracts with integrated broiler companies for production-related services such as feed supply, cooping and hauling, and chick placement. Under such an arrangement, the integrator has traditionally retained title ownership of the broilers, as would a bank or other lending institution in making a loan. The grower is paid by the integrator for

producing mature broilers on a per pound basis. However, the integrated company maintains no investment or security interest in the broiler grower's farming operation. Therefore, the costs of the actual production facilities are incurred 100% by the broiler grower.

All businesses, farming included, to a large degree, depend upon other businesses. Car manufacturers depend on tire companies; publishing companies depend on paper manufacturers; and housing developers depend on plumbing contractors. However, such dependency does not mitigate the financial risk of any one business. Clearly, one business cannot borrow or absorb the nature or fundamental purpose of another business without a merger or other form of acquisition. In *Bayside Enterprises, Inc.* v. *National Labor Relations Board,* 429 U. S. 298, this court held that the feed truck drivers of an integrated poultry company which did not own or operate farms to which it provided feed for broiler production were not exempt from coverage as agricultural laborers under section 2(3) of the National Labor Relations Act, 29 U. S. C. 152(3). In so holding, Justice Stevens indicated: "For the activity of storing poultry feed and then using it to feed the chicks is work performed by the contract farmer [broiler grower] rather than by Bayside. Since the status of the drivers is determined by the character of the work which they perform for their own employer [integrated company], the work of the contract farmer cannot make the drivers agricultural laborers. And their employer's operation of a feedmill is a nonagricultural activity [footnote omitted]." *Bayside Enterprises, Inc., supra,* 429 U. S. at 303.

On the one occasion that this court specifically discussed the meaning of a "farmer" under the Capper-Volstead

Act, it placed great emphasis on the fact that only "actual producers" of agricultural products are entitled to the benefits of the Act. *Case-Swayne Company* v. *Sunkist Growers, Inc.,* 389 U. S. 384 at 391, 392 and 393. The business interests of citrus packing houses in *Case-Swayne, supra,* not unlike the poultry processing interests of the integrated companies, were held to be "nonproducer," thereby disqualifying the packing houses as bona fide farmer members of the Sunkist cooperative. *Case-Swayne Company, supra,* 389 U. S. at 395 and 396.

B. The Bargaining Position of the Broiler Grower as the Only Farmer of Broilers Is Effectively Eliminated by Conferring Benefits of the Capper-Volstead Act on Integrated Companies.

Allowing integrated companies to assume a farmer status under the Capper-Volstead Act and thereby unify through membership in petitioner will prevent the broiler grower from achieving the economic benefits offered by the Act. Acting under the pretense of being "farmers," integrated companies can combine to eliminate competition among themselves. Elimination of competition through agreement on the marketing prices of processed broilers, the available supply of broilers and other terms would, by necessity, preclude broiler growers from effective negotiations with one or more integrated companies. By virtue of their superior marketing position as "farmers," integrators could impose the price or price ranges to be paid for broiler production. Production quantity and other inputs would also be easily dictated.

The broiler growers' general economic standing would additionally compound their threatened ability to deal with

integrators. As stated by the National Commission on Food Marketing:

> "Contract broiler growing was not, however, an unmixed blessing. Though numerous growers found broiler production more profitable than cotton or other crops, earnings on labor and investment were still low in most instances. There were more farmers hoping to grow broilers than could be accommodated by the contracting companies. Growers have had contracts for only single growout periods, although many have been able to continue for considerable periods with a given company. Numerous farmers constructed houses and facilities without assurance they would obtain chicks and feed to employ their facilities and their labor.'"[3]

In a 1977 Alabama study, broiler growers' average gross return for recent years ranged between 2.1 and 2.4 cents per pound of broilers produced. After deducting cash operating expenses, average net income for a producer was between $5,300 and $5,800 in 1972-4 and at $4,652 for the first eight months of 1975.[4]

An interpretation of the Capper-Volstead Act which would benefit the integrated middlemen to the economic disadvantage of the broiler grower is an anomaly. Congress did not intend to help the middleman with which farmers must deal by enacting the Capper-Volstead Act.

3. National Commission on Food Marketing, "Organization and Competition in the Poultry and Egg Industries," Technical Study No. 2, page 10 (1966).

4. USDA, Farm Cooperative Service, Service Report 151 (1977), pages iv (preface), 4 and 6. Sixty-five percent of the broiler producers surveyed indicated an interest and willingness to invest in a cooperative. This included 73 active broiler growers, 9 of whom were raising pullets. All but two producers owned their farms (page 1).

"To be sure, a principal concern of Congress was to prohibit the participation in the collectivity of the predatory middleman, the speculator who bought crops in the field and returned but a small percentage of their eventual worth to the grower." *Case-Swayne Company, supra,* 389 U. S. at 393.

The defeat by the Senate of an amendment submitted by Congressman Phipps which would have placed manufacturers under the Act also demonstrates congressional intent to exclude from Capper-Volstead protection processing entities which contract with farmers for production output.[5] As stated by Senator Capper in discussing the Act in bill form: "Its purpose is to give to the farmer the same right to *bargain collectively* that is already enjoyed by corporations." [Emphasis supplied.][6]

At page 24 of its brief, the petitioner threatens that if the integrators' exemption from Section 1 of the Sherman Act, 15 U. S. C. 1, is disallowed under the Capper-Volstead Act, then the integrators may decide to buy out the broiler growers and fashion them as employees. Petitioner, in representing its integrated members, would not be before this court if such a "buy out" were a viable alternative. Factors which would preclude such an alternative include the tremendous increase of capital investment in geographically scattered farms and equipment, the added cost of statutory employment benefits, and the superior ability and incentive of broiler producers to independently achieve efficient production.

Although broiler growers, as independent farmers, are confronted by heavyweight integrated companies, the

5. See 62 *Cong. Rec.* 2274 and 2275 (1922).

6. 62 *Cong. Rec.* 2057 (1922).

goliath investment of such companies does not mitigate the farming investment of the broiler grower. The grower's return on farming investment can only be protected by maintenance of a viable bargaining relationship with the integrator. Such a relationship cannot be nurtured if the integrator is allowed the antitrust benefits owed to the broiler producer under the Capper-Volstead Act.

C. Subsequent Legislation Prohibits Extension of the Capper-Volstead Act to Integrated Companies.

Enactment of the Agricultural Fair Practices Act (AFPA) in 1968, 7 U. S. C. 2301 *et seq.*, is indicative that Congress does not consider a poultry integrator which relies on broiler growers for actual production as a "farmer" within the context of current agri-business sophistication.

The purpose of AFPA was to improve the bargaining position of farmers by allowing them to freely join cooperative associations without coercive reprisals from middlemen and other handlers. As stated in the purpose clause: "Because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law." 7 U. S. C. 2301.

In protecting the freedom to join cooperative organizations, Congress prohibited discrimination "against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition, or other handling of agricultural products" because of membership in a cooperative association. 7 U. S. C. 2303(b).[7] The phrase "other handling of agricultural products" is fully explained in the Senate Report to protect the contract broiler grower in the instant case as a producer of agriculture against discrimination by integrated companies: "As introduced, the bill prohibited discrimination in the terms of 'purchase or acquisition' of agricultural products. The committee found that this provision would be ineffective with respect to much that it was manifestly intended to prohibit. *Thus a broiler contractor might furnish hatching eggs or chicks to a producer under a bailment contract where title remained in the contractor;* or a canning company might furnish seeds or tomato plants to a producer under a similar arrangement. *No 'purchase or acquisition' would be involved.* The committee amendment would extend this provision to 'other handling' of agricultural products, thereby covering the examples just given and greatly broadening the scope of this provision." [Emphasis supplied.][8]

Furthermore, in the report of the U. S. Department of Agriculture recommending passage of the Agricultural Fair Practices Act, Secretary Freeman recognized the importance of protecting the bargaining power of contract farmer-producers, such as the broiler grower, against large integrating firms which must rely on contract farmers for production:

> "Cooperative action in agricultural production and marketing is increasing. It is growing in response to

7. 7 U. S. C. 2303(b) prohibits a handler from knowingly engaging in the following practice:

(Footnote continued on next page.)

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> "To discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association of producers."

8. Sen. Rep. No. 474, 90th Cong., 1st Sess. (1967).

the need, (1) to achieve more orderliness and efficiency in production and marketing, and (2) to protect and improve bargaining relationships between producers and marketing firms in the face of major changes taking place in the marketing system.

"These changes include the growing integration of production and marketing of agricultural products, the increased control of these functions by large, diversified corporations, and the expanded use of contracting by such corporations to meet their needs. Developments such as these weaken the marketing and bargaining position of individual producers." [Emphasis supplied.][9]

In view of such Congressional and Departmental sentiment, the term "handler" was defined in the AFPA to describe the investment and activities of entities such as the integrated company which could potentially discriminate against the producer. As defined in the Act, the term "handler" means "any person engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; or (2) grading, packaging, handling, storing or *processing agricultural products received from producers* or associations of producers; or (3) *contracting* or negotiating contracts or other arrangements, written or oral, *with or on behalf of producers or associations of producers with respect to the production* or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in clause (1), (2), or (3) . . . [above]." [Emphasis supplied.] 7 U. S. C. 2302(a).[10]

9. U. S. Code, Cong. & Admin. News (1968), page 1875.

10. It is possible that an "association of producers" under the AFPA may also fall within AFPA's definition of a "handler" to

(Footnote continued on next page.)

Congress clearly had the Capper-Volstead Act well in mind in passing the Agricultural Fair Practices Act. The term "association of producers" is defined to mean "any association of producers of agricultural products" as defined in the Capper-Volstead Act, 7 U. S. C. 291, or Section 15(a) of the Agricultural Marketing Act of 1929, 12 U. S. C. 1141j(a). 7 U. S. C. 2302(c). The term "producer" is defined to mean "a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower." 7 U. S. C. 2302(b).[11]

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the extent that it acts as a "handler." *Butz* v. *Lawson Milk Co., Division Consol. Foods Corp.*, 386 F. Supp. 227 at 235; *Marketing Assist. Plan, Inc.* v. *Associated Milk Pro., Inc.*, 338 F. Supp. 1019 at 1024. However, it does not follow that all handlers are thereby readily constituted "producers" or entitled to be an "association of producers." The Congressional purpose in not defining "handlers" and "association of producers" as being mutually exclusive was to make certain that the protection of the Agricultural Fair Practices Act would be extended to producer associations which secondarily engaged in handling of its members' products. As stated in the Senate Report:

"The committee gave serious consideration to limiting the protection of the bill *to bargaining cooperatives, which were not engaged in the actual handling of agricultural products* in competition with other handlers. However, this would have excluded cooperatives which might be primarily or partly bargaining associations but also handle some portion of their members' products." Sen. Rep. No. 474, 90th Cong., 1st Sess. (1967). [Emphasis supplied.]

11. 7 U. S. C. 2302(b) provides:

"The term 'producer' means a person engaged in the production of agricultural products as a farmer, planter, rancher, dairyman, fruit, vegetable, or nut grower."

7 U. S. C. 2302(c) provides:

"The term 'association of producers' means any association of

(Footnote continued on next page.)

In view of the similarity in purpose of the two laws—to improve the bargaining power of farmers—the meaning of the term "farmer" must be consistently construed in both instances. Exclusion of petitioner's members as farmers under the Agricultural Fair Practices Act would thereby require exclusion under the Capper-Volstead Act.

CONCLUSION.

The judgment of the court of appeals declaring that broiler integrators are not "farmers" under the Capper-Volstead Act should be affirmed.

Respectfully submitted,

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(Footnote continued from preceding page.)

producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 1141j(a) of Title 12, or in section 291 of this title."